17-441

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

No. 210.

JOHN L. MERRIAM, APPELLANT,

vs.

THE UNITED STATES.

APPEAL FROM THE COURT OF CLAIMS.

FILED APRIL 19, 1893.

SUPREME COURT OF THE UNITED STATES.

No. 210.

JOHN L. MERRIAM, APPELLANT,

vs.

THE UNITED STATES.

APPEAL FROM THE COURT OF CLAIMS.

INDEX.

	Original.	Print.
Petition	1	1
Traverse	15	7
Findings of fact and conclusion of law	16	7
Opinion of the court	19	13
Final judgment	22	17
Application for and allowance of an appeal	23	18
Certificate	24	18

1 *Petition.—Filed Dec.* 4, 1877.—*J. R.*

UNITED STATES OF AMERICA.

Court of Claims.

JOHN L. MERRIAM
vs.
THE UNITED STATES. } No. 11842.

To the honorable the chief justice and judges of the United States Court of Claims:

Your petitioner, John L. Merriam, respectfully complaining, shows to this court and states that he is a citizen of the United States and a resident of Saint Paul, in the State of Minnesota, and that heretofore, to wit, on the twenty-ninth day of June, 1877, he duly made and entered into a contract to and with the United States, by and through Major Benjamin C. Card, quartermaster United States Army, chief quartermaster of the Department of Dakota, then and there duly authorized to act in
2 the premises, and acting for and on behalf of the United States, which said contract is in the words and figures following, viz:

This agreement, made and entered into this twenty-ninth day of June, A. D. one thousand eight hundred and seventy-seven, by and between Major Benjamin C. Card, quartermaster United States Army, chief quartermaster of the Department of Dakota, for and on behalf of the United States, party of the first part, and John L. Merriam, of Saint Paul, county of Ramsey, and State of Minnesota, party of the second part, for himself, his heirs, executors, administrators, and assigns, witnesseth:

That the said parties have covenanted and agreed, and by these presents do covenant and agree, to and with each other as follows:

ARTICLE I. That the said John L. Merriam, his heirs, assigns, administrators, and executors, shall supply or cause to be supplied and delivered, to the quartermaster's department at the military station of Bismarck, D. T., six hundred thousand pounds, more or less, of oats, at two dollars and twenty-three and seven-sixteenths cents (2.23 7-16-100) per one hundred pounds; (the oats to be of good merchantable quality, free from dirt, or other foreign matter, and to be delivered in good, new, burlap sacks, each sack to contain no greater quantity than 128 pounds;) or such other quantity, more or less, as may be required from time to time for the wants of said station, between the first day of July, 1877, and the thirty-first day of December, 1877, in such quantities and at such times as the
3 receiving officer may require; Provided, That this contract is approved by the commanding generals of the Department of Dakota and of the Military Division of the Missouri; otherwise, not until such approval is obtained.

ARTICLE II. That the said oats, when delivered, shall be subject to inspection on behalf of the United States, as provided by general orders No. 87, dated Headquarters Department of Dakota, October 31st, 1873.

ARTICLE III. That the said party of the second part shall be entitled to military protection in the execution of this contract or agreement, when-

ever from the hostilities of the Indians it may be deemed necessary by the post commander, whose duty it shall be to furnish protection to the extent of his power; this stipulation to give no foundation for any claim against the government for damage from Indians, or from any detriment arising from their depredations or hostilities.

ARTICLE IV. That it is expressly agreed and understood that this contract is made under General Orders No. 49, War Department, Headquarters of the Army, dated May 15th, 1877, and under authority of the following law, section 3732 Revised Statutes: "No contract or purchase on behalf of the United States shall be made unless the same is authorized by law, or is under an appropriation adequate to its fulfillment, except in the War and Navy Departments, for clothing, subsistence, forage, fuel, quarters, or transportation, which, however, shall not exceed the necessities of the current year." No payment will be possible, under
4 the contract, until and unless appropriation is made by Congress for the support of the Army during the fiscal year beginning 1st July, 1877, to which alone this contract pertains.

ARTICLE V. That in case of failure of the said party of the second part to comply with the stipulations of this contract according to the true intent and meaning thereof, then the party of the first part shall have the power to supply the deficiency by purchase, or otherwise, and the said party of the second part shall pay the difference in cost, and any money due said party of the second part may be used and applied to such payment.

ARTICLE VI. That it is expressly understood by the party of the second part that, in conformity to the requirements of section 3737 of the Revised Statutes, neither this contract, nor any interest therein, shall be transferred to any other party or parties, and that any such transfer shall cause the annulment of the contract so far as the United States are concerned; all rights of action, however, for any breach of this contract by the contracting parties being reserved to the United States.

ARTICLE VII. That it is expressly agreed and stipulated, between the parties to this contract, that upon mutual agreement, it may be changed, altered, modified, or abrogated, in whole or in part; but no such change, alteration, modification, or abrogation shall entitle the said John L. Merriam to increased rates of compensation over the rates herein specified.

5 ARTICLE VIII. That it is further expressly agreed and understood that no member of Congress, officer, agent or employee of the government shall be admitted to any share or part in this agreement, or derive any benefit to arise therefrom.

ARTICLE IX. That this agreement is made subject to the approval of the commanding general of the Department of Dakota and of the Military Division of the Missouri.

In witness whereof the undersigned have hereunto subscribed their names and affixed their seals the day and date above written.

BENJ. C. CARD, [SEAL.]
Quartermaster U. S. A.
JOHN L. MERRIAM. [SEAL.]

Witness:
J. B. LOYD.
A. M. PETTIT.

HEADQUARTERS DEPARTMENT OF DAKOTA,
St. Paul, Minn., September 8, 1877.

Approved.

ALFRED H. TERRY,
Brigadier-General U. S. A., Commanding Department.

6 HEADQUARTERS MILITARY DIVISION OF THE MISSOURI,
Chicago, Sept. 19, 1877.

Approved by P. H. Sheridan, Lieutenant-General, commanding.

R. C. DRUM,
Assistant Adjutant-General.

Which said contract was duly executed and approved by the commanding generals of the Department of Dakota and of the Military Division of the Missouri, and delivered to your petitioner, and was in full force from and after said twenty-ninth day of June, A. D. 1877.

And your petitioner avers that the amount of oats required by the receiving officer at the military station of Bismarck, Dakota Territory, between the first day of July, A. D. 1877, and the thirty-first day of December, A. D. 1877, was a large quantity, to wit, four million pounds; and that said receiving officer did require the said four million pounds to be delivered to him; and that the United States, by and through Major Benjamin C. Card, quartermaster United States Army and chief quartermaster of the Department of Dakota, did permit and authorize your petioner to deliver six hundred and seventy-four thousand seven hundred and ninety-eight pounds of the same, and no more, which were duly inspected and accepted and vouchers issued therefor, as appears by Exhibits A and B, hereto attached, and made part of this petition; and your petitioner avers that the United States did buy and cause to be delivered at said military station of Bismarck, of other parties than your peti-
7 tioner, and at a higher rate than the contract rate to your petitioner, a large quantity, to wit, three million three hundred and twenty-five thousand two hundred and two pounds (3,325,202), in violation of the terms of said contract to and with your petitioner, and did commence receiving said oats from said other parties about July 15th, 1877, and have received the whole thereof.

And your petitioner avers that he was ready and willing at all times to perform, and had made full preparations to perform, the said contract fully and in all respects upon his part according to the terms of said written contract, and on the said twenty-ninth day of June, A. D. 1877, had purchased, and had in his possession, one million six hundred thousand pounds of said oats, and offered to deliver and tendered the same to said receiving officer at said military station at Bismarck, and to said chief quartermaster and to defendant, but that said officer and said B. C. Card, chief quartermaster Department of Dakota, and the defendant refused to receive the same from your petitioner, as in and by said contract the United States had promised and agreed to do, but on the contrary thereof received a large quantity, to wit, three million three hundred and twenty-five thousand two hundred and two (3,325,202) pounds, required at said military station of Bismarck, by the receiving officer at that station, at a price higher than the contract price with your petitioner, of and from other

persons than your petitioner, during the months of July, August, September, and October, A. D. 1877.

And your petitioner avers that said contract was broken by the
8 defendant on or about the 15th day of July, A. D. 1877, when, although said receiving officer requested three million three hundred and twenty-five thousand two hundred and two pounds of said oats more than the specific amount named in said contract, and although your petitioner was ready and willing and offered to furnish the same the defendant refused to receive the same from your petitioner, or any part thereof, and has continued to refuse to receive the same, or any part thereof, since that time, or to receive any more from your petitioner during the period ending December 31st, 1877, than said 674,798 pounds, but has received said 3,325,202 pounds from other parties than your petitioner.

And your petitioner avers that at the time of the said breach of said contract by the defendant he had made full preparations to perform the same, and that upon the full performance of said contract he would have received seventy-four thousand two hundred and ninety-seven 44-100 dollars ($74,297.44); and that by the sale of oats purchased by him to enable him to fulfill said contract at the best market rates, added to the cost of sacking and transportation which was saved to your petitioner by the refusal of the United States to permit him to fulfill said contract, there is an offset to the same in favor of the United States of fifty-three thousand and one hundred and seventy-one dollars and ninety-nine cents ($53,171.99), leaving a balance of damages sustained by your petitioner of twenty-one thousand one hundred and twenty-five dollars and fifty-four cents, as appears by a schedule hereto attached and marked Exhibit C and made part
of this petition. And the aggregate damages sustained by your
9 petitioner by the breach of said contract as aforesaid is twenty-one thousand one hundred and twenty-five dollars and fifty-four cents, and that because said claim is for unliquidated damages it has not been presented to any executive department.

And your petitioner further avers that he never at any time gave any aid, comfort, countenance, or encouragement to rebellion against the government of the United States, but has always at all times borne true faith and allegiance to said government.

Wherefore your petitioner, by reason of the premises, prays judgment against the United States for the sum of twenty-one thousand one hundred and twenty-five dollars and fifty-four cents ($21,125.54.)

SANBORN & KING,
Attorneys for Claimant.

UNITED STATES OF AMERICA,
District of Minnesota, ss:

John L. Merriam, being first duly sworn, deposes and says that he is the claimant in the foregoing petition, and that no assignment or transfer of the claim stated and set forth in said petition have ever been made; that the claimant is justly entitled to the amount therein claimed from the United States, after allowing all just credits and offsets, and that he believes the facts stated in said petition are true.

JOHN L. MERRIAM.

Subscribed and sworn to before me this 27th day of November, A. D. 1877.

[SEAL.] H. E. MANN, *Clerk.*

Post-office address of claimant: St. Paul, Minnesota.
Post-office address of attorneys: Washington, D. C.

EXHIBIT A.

BISMARCK, D. T., *July* 12, 1877.

I hereby certify that I have inspected the following cars of oats, viz: Nos. 2034, 1386, 1314, 2186, 2310, 2262, 552, 513, 634, 1842, 1130, 2284, 1334, 1098, and 1248, containing 2654 sacks, presented by Jno. L. Merriam for receival by Lt. C. St. J. Chubb, A. A. Q. M., and find the same to be of good merchantable quality, reasonably free from dirt or other foreign matter.

(Signed) L. A. GILBERT,
Inspector.

The United States to John L. Merriam, Dr.

REGULAR SUPPLIES.

Place and date of purchase.		Dollars.	Cts.
Bismarck, D. T., July 12, 1877.	For 347,584 pounds of oats, at $2.23 7/16 per 100 pounds	$7,766	33

This grain was furnished under a contract with the chief quartermaster Department of Dakota, dated the 29th day of June, 1877. Payment thereon is to be made when appropriation applicable becomes available.

$7,766 33

I certify that the above account is correct and just, and that the articles have been accounted for on my property return for the quarter ending on the 30th of September, 1877.

(Signed) C. ST. J. CHUBB,
2nd. Lt. 17th Inft., A. A. Quartermaster, U. S. A.

EXHIBIT B.

BISMARCK, D. T., *July* 5, 1877.

I certify that I have this day inspected (14) fourteen car loads of oats, presented by Jno. L. Merriam for receival by 2nd Lt. C. St. J. Chubb, A. A. Q. M., and that the oats are good, sound, and merchantable.

(Signed) E. P. PEARSON,
Capt. 17th Inf'ty, Inspector.

The United States to John L. Merriam, Dr.

REGULAR SUPPLIES.

Date and place of purchase.		Dollars.	Cts.
Bismarck, D. T., July 5, '77.	For 327,214 pounds of oats at $2.23 7/16 per 100 pounds	7,311	19

This grain was furnished under a contract with the chief quartermaster Department of Dakota, dated the 29th day of June, 1877. Payment thereon is to be made when appropriation applicable becomes available.

7,311 19

I certify that the above account is correct and just, and that the
13 articles have been accounted for on my property return for the quarter ending on the 30th of September, 1877.

(Signed) C. ST. J. CHUBB,
2nd Lt. 17th Inft., A. A. Quartermaster U. S. A.

EXHIBIT C.

The United States in account with John L. Merriam.

Nov. 1877.	To contract price of 3,325,000 lbs. of oats at the military station of Bismarck, D. T., during the months of July, August, September, October, and November, 1877, being at the rate of $2.23 7/16 per 100 lbs	$74,297	44

Said Merriam having contracted to furnish the same at said military station of Bismarck, D. T., by his contract with Gen. B. C. Card, quartermaster U. S. Army, chief quartermaster Department of Dakota, at Saint Paul, Minn., dated June 29, 1877, which contract the said Merriam had made full and complete arrangements to fulfill and execute in accordance with the terms thereof, and the said Merriam was at all times ready and willing to furnish and deliver
14 said oats at the military station of Bismarck, D. T., and did offer to make such delivery, but said offer was declined, and said oats were received from some other person or persons, by the officer of the quartermaster's department at the military station of Bismarck, D. T., in accordance with instructions from the chief quartermaster, Dept. of Dakota, as will fully appear from the records of the office of said chief quartermaster.

From the amount above charged deduct the amount saved, and the necessary additional expenses which would have been incurred by the said Merriam in the delivery of said oats		53,171	90
		$21,125	54

15 *II. Traverse.—Filed Dec.* 10, 1877.

And now comes the Attorney-General on behalf of the United States, and answering the petition of the claimant herein, denies each and every allegation therein contained; and asks judgment that the petition be dismissed.

And as to so much of the said petition as avers that the said claimant has at all times borne true faith and allegiance to the Government of the United States, and has not in any way voluntarily aided, abetted, or given encouragement to rebellion against the said government, the Attorney-General, in pursuance of the statute in such case provided, denies the said allegations, and asks judgment accordingly.

THOMAS SIMONS,
Ass't Att'y General.

16 III. *Findings of fact and conclusion of law.—Filed April* 21, 1879.

This case having been heard before the Court of Claims, the court, upon the evidence, finds the facts to be as follows:

1. The chief quartermaster of the Military Department of Dakota published an advertisement, the parts of which, and of the circular therein referred to, which may be material in this, are as follows:

"CHIEF QUARTERMASTER'S OFFICE,
"*St. Paul, Minn., March* 1, 1877.

"Sealed proposals, in triplicate, subject to the usual conditions, will be received at this office, and at the offices of the quartermasters at the following-named posts, and at Sioux City, Iowa, until 12 o'clock, noon, on the 26th day of April, 1877, at which time and place they will be opened in the presence of bidders, for furnishing and delivery of wood, coal, grain, hay, and straw, required during the fiscal year commencing July 1, 1877, and ending June 30, 1878, at the following posts and stations, viz:

"Forts Abercrombie, Abraham Lincoln, Buford, Pembina, Randall, Rice, Seward, Stevenson, Sully, Sisseton, and Totten, and Camp Hancock, and military stations at Cheyenne, Lower Brule, and Standing Rock Agencies, D. T., at Fort Snelling, Minn., at Forts Benton, Ellis, and Shaw, and Camp Baker, M. T., and also at posts at or near mouth of Tongue River, and at posts on or near Big Horn River, M. T.

"Separate bids should be made for each post and for each class of supplies. A copy of this advertisement should be attached to each bid. Bids for any portion of the specified supplies will be received, and preference given to articles of domestic production.

* * * * * * *

"The government reserves the right to reject any or all bids. In bidding for grain, bidders will state the rate per 100 pounds, and not per bushel.

"Blank proposals and printed circulars stating the kind and estimated quantities required at each post, and giving full instructions as to the manner of bidding, conditions to be observed by bidders, and terms of contract and payment, will be furnished on application to this office or to the quartermasters at the various posts and stations named.

* * * * * * *

"BENJ. C. CARD,
"*Chief Quartermaster.*"

General instructions and circular of information for bidders: * * *

"1. All bids should be made in triplicate upon printed forms to be obtained at this office.

* * * * * * *

"7. The right is reserved on the part of the government to reject any or all bids; also to disregard the bid of any failing bidder or contractor, known as such to the quartermaster's department.

"8. The bidder must furnish satisfactory evidence of his ability to furnish the materials or perform the work for which he bids.

"9. * * * * * * *

"10. * * * * * * *

"The following are the estimated quantities of supplies that will be required at each post, but the government reserves the right to increase or diminish the same at any time during the continuance of the contract, and to require deliveries to be made at such times and in such quantities as the public service may demand:

"*Fort Abraham Lincoln, D. T.*— * * * 2,404,000 pounds oats. * * *

"*Fort Buford, D. T.*— * * * 256,000 pounds oats. * * *

"*Cheyenne Agency, D. T.*— * * * 131,000 pounds oats. * * *

"*Camp Hancock, D. T.*— * * * 5,400 pounds oats. * * *

"*Lower Brule Agency, D. T.*— * * * 34,300 pounds oats. * * *

"*Fort Randall, D. T.*— * * * 233,000 pounds oats. * * *

"*Fort Rice, D. T.*— * * * 1,000,000 pounds oats. * * *

"*Standing Rock Agency, D. T.*— * * * 255,000 pounds oats. * * *

"*Fort Stevenson, D. T.*— * * * 96,000 pounds oats. * * *

"*Fort Sully, D. T.*— * * * 50,000 pounds oats. * * *

"OATS.—To be of good merchantable quality, free from dirt or other foreign matter, and to be delivered at Forts Shaw and Ellis, and Camp Baker, M. T., in bulk, for the quantity required at those posts, at the rate of 32 pounds to the bushel, and at all other named places, in new burlap sacks, each sack to contain no greater quantity than 128 pounds.

* * * * * * *

"Proposals are invited for the furnishing and delivery at the respective posts and stations of the supplies called for, except as to the grain for Forts Abraham Lincoln, Buford, Randall, Rice, Stevenson, and Sully, Camp Hancock, and the military stations of Cheyenne, Lower Brule, and Standing Rock Agencies, the proposals for which will be made for the delivery of the grain either at Sioux City, Yankton, Bismarck, or Fort Abraham Lincoln. Proposals will be received for the delivery of grain required at the posts on Tongue River and Big Horn River, either at those posts, or at Fort Ellis, Sioux City, Yankton, or Bismarck."

II. The following proposals were made in accordance with said advertisement:

"APRIL 23D, 1877.

"To Gen'l B. C. CARD,
"*Quartermaster U. S. A., Saint Paul, Minn.:*

"SIR: Agreeably to the advertisement inviting proposals for oats, dated March 1, 1877, a copy of which is hereunto annexed, and subject to the conditions thereof, and in accordance with the requirements of your advertisement, the undersigned hereby propose to furnish four million pounds of oats, delivered at Bismarck, D. T., for two $\frac{1}{4}$th ($2\frac{1}{4}$) cents per pound, and pledge myself to enter into a written contract with the United States, with good and approved security, within seven days after being notified that this bid has been accepted.

"Respectfully, &c.,

"WILLIAM HALL."

17

"APRIL 26, 1877.

"To Gen. B. C. CARD,
"*Chief Q. M. St. Paul:*

"SIR: Agreeably to the advertisement inviting proposals for oats, &c., dated March 1st, 1877, a copy of which is hereunto annexed, and subject to the conditions thereof, and in accordance with the requirements of your advertisement, we, the undersigned, hereby propose to furnish at Bismarck, D. T., two hundred thousand bushels oats (32lb to the bushel), in burlap sacks, of the following rates, viz:

"50,000 bushels at seventy-one & $\frac{1}{2}$ cents ($71\frac{1}{2}$) per bushel.
"50,000 " " seventy-three cents (73) " "
"50,000 " " seventy-four cents (74) " "
"50,000 " " seventy-six cents (76) " "

and pledge myself to enter into a written contract with the United States, with good and approved security at once, days after being notified that this bid has been accepted.

"The oats to be equal in quality to Chicago No. 2 oats, as established by the Chicago board of grain inspectors, & now in force, for the crop of 1876. Delivery to commence at once, and all be delivered by June 30, '77, if required.

Respectfully, &c.,

"JOHN L. MERRIAM."

The chief quartermaster notified said bidders of the acceptance of their bids by letters, as follows:

"ST. PAUL, MINN., *May* 18, 1877.

"Mr. JNO. L. MERRIAM,
"*Saint Paul, Minn.:*

"SIR: You are respectfully informed that a contract has been awarded to you for furnishing and delivering at Bismarck, D. T., 1,000,000 pounds of oats, at $\$2.23\frac{7}{16}$ per 100 lbs.

* * * * * * *

"The papers in the case of the contract will be sent to you for execution so soon as they can be prepared.

"Very respectfully, your obedient servant,

"BENJ. C. CARD,

"*Bv. Brig. General, Chief Quartermaster.*"

"ST. PAUL, MINN., *June* 27, 1877.

"Mr. WM. HALL,

"*Care of P. H. Kelly, Saint Paul Minn.:*

"SIR: An award for furnishing and delivering at Bismarck, D. T., of 2,620,000 pounds of oats, at $2.25 per 100 lbs., under your bid of the 23d April, 1877, is hereby made.

* * * * * * *

"Please acknowledge the receipt of this letter.

"Very respectfully, your obedient servant,

"BENJ. C. CARD,

"*Bt. Brig. General, Chief Quartermaster.*"

"ST. PAUL, MINN., *June* 27, 1877.

"Mr. JNO. L. MERRIAM,

"*Saint Paul, Minn.:*

"SIR: A further award for the delivery by you at Bismarck, D. T., of 600,000 pounds of oats, at 2.23\frac{7}{16}$ per 100 lbs., is hereby made.

* * * * * * *

"Very respectfully, your obedient servant,

"BENJ. C. CARD,

"*Bt. Brig. General, Chief Quartermaster.*"

III. On the 29th of June, 1877, the following contract, upon which this action is brought, and set forth in full in the petition, was duly entered into by the parties thereto, and approved by the general in command of the department. It was made on a printed blank furnished by defendant's officers, but in addition to the printed matter, the words here printed in italics and in brackets were written therein.

"This agreement, made and entered into this twenty-ninth day of June, one thousand eight hundred and seventy-seven, by and between Major Benjamin C. Card, quartermaster United States Army, chief quartermaster of the Department of Dakota, for and on behalf of the United States, party of the first part, and John L. Merriam, of Saint Paul, county of Ramsey, and State of Minnesota, party of the second part, for himself, his heirs, executors, administrators, and assigns, witnesseth:

"That the said parties have covenanted and agreed, and by these presents do covenant and agree, to and with each other as follows:

"ARTICLE I. That the said John L. Merriam, his heirs, assigns, administrators, and executors shall supply, or cause to be supplied and delivered to the quartermaster's department at the military station of [*Bismarck, D. T., six hundred thousand pounds, more or less, of oats, at two dollars and twenty-three and seven-sixteenths cents* (2.23\frac{7}{16}$) *per one hundred pounds, the oats to be of good merchantable quality, free from dirt or other foreign matter, and to be delivered in good, new burlap sacks, each sack to contain no greater*

quantity than 128 *pounds,*] or such other quantity, more or less, as may be required from time to time for the wants of said station, between the first day of July, 1877, and the thirty-first day of December, 1877, in such quantities, and at such times as the receiving officer may require: Provided that this contract is approved by the commanding generals of the Department of Dakota, and of the Military Division of the Missouri; otherwise not until such approval is obtained.

"ARTICLE II. That the said oats, when delivered, shall be subject to inspection on behalf of the United States, as provided by General Order No. 87, dated Headquarters Department of Dakota, October 31st, 1873.

"ARTICLE III. That the said party of the second part shall be entitled to military protection in the execution of this contract or agreement, whenever from the hostilities of the Indians it may be deemed necessary by the post commander, whose duty it shall be to furnish protection to the extent of his power; this stipulation to give no foundation for any claim against the government for damage from Indians, or for any detriment arising from their depredations or hostilities.

"ARTICLE IV. That it is expressly agreed and understood that this contract is made under General Orders No. 49, War Department, Headquarters of the Army, dated May 15th, 1877, and under authority of the following law: Section 3732, Revised Statutes, 'No contract or purchase on behalf of the United States shall be made unless the same is authorized by law, or is under an appropriation adequate to its fulfillment, except in
the War and Navy Departments, for clothing, subsistence, forage,
18 fuel, quarters or transportation, which, however, shall not exceed
the necessities of the current year.' No payment will be possible under the contract until, and unless appropriation is made by Congress for the support of the Army during the fiscal year beginning 1st July, 1877, to which alone this contract pertains.

"ARTICLE V. That in case of the failure of the said party of the second part to comply with the stipulations of this contract, according to the true intent and meaning thereof, then the party of the first part shall have the power to supply the deficiency by purchase, or otherwise, and the said party of the second part shall pay the difference in cost, and any money due said party of the second part may be used and applied to such payment.

"ARTICLE VI. That it is expressly understood by the party of the second part that, in conformity to the requirements of section 3737 of the Revised Statutes, neither this contract, nor any interest therein, shall be transferred to any other party or parties, and that any such transfer shall cause the annulment of the contract so far as the United States are concerned, all rights of action, however, for any breach of this contract by the contracting parties being reserved to the United States.

ARTICLE VII. That it is expressly agreed and stipulated between the parties to this contract that, upon mutual agreement, it may be changed, altered, modified, or abrogated, in whole, or in part; but no such change, alteration, modification, or abrogation shall entitle the said John L. Merriam to increased rates of compensation over the rates herein specified.

"ARTICLE VIII. That it is further expressly agreed and understood, that no member of Congress, officer, agent, or employé of the government shall be admitted to any share or part in this agreement, or derive any benefit to arise therefrom.

"ARTICLE IX. That this agreement is made subject to the approval of the commanding generals of the Department of Dakota and of the Military division of the Missouri.

"In witness whereof the undersigned have hereunto subscribed their names and affixed their seals the day and date above written.

"BENJ. C. CARTER, [SEAL.]
"*Quartermaster U. S. A.*
"JNO. L. MERRIAM." [SEAL.]

IV. In further execution of the acceptance of said bids, and in accordance with said first letter of acceptance of May 18, 1877, the claimant entered into another contract with said quartermaster, bearing date May 15, 1877, for the delivery of 1,000,000 pounds of oats, which said contract was otherwise identical in terms with that set forth in the next preceding finding, except that the words "Or such other quantity, more or less, as may be required from time to time for the wants of said station, between the 1st day of July, 1877, and the 31st day of December, 1877, in such quantities and at such times as the receiving officer may require," printed in article I, following the written matter, were erased.

Two other contracts, dated June 29, 1877, were made between said quartermaster and said Hall, in accordance with his said bid, one for the delivery of 665,000 pounds of oats, and the other for the delivery of 1,955,000 pounds, each at $2.25 per one hundred pounds; and in other respects the two contracts were identical in form with those of the claimant, the one first above mentioned having the same printed words erased which were erased from said claimant's contract of May 15, 1877, as stated in this finding, and the other containing them.

V. There were delivered at Bismarck, as under the two contracts of said Hall, by parties other than the claimant, 3,116,616 pounds of oats between July 1, 1877, and December 31, 1877.

VI. The claimant after the execution of his said contracts respectively commenced delivering oats thereunder, and by July 12, 1877, had delivered more than 1,600,000 pounds specifically mentioned in the two contracts, the excess having been received by the acting assistant quartermaster (Chubb), at Bismarck, by mistake, and he has been paid in full for all that he has delivered.

Subsequently he offered to deliver more oats, as set forth in the following telegrams; but they were refused, as therein appears:

"BISMARCK, D. T., 27 *July*, 1877.

"To CHF. QM., *St. P., Minn:*

"Jno L. Merrian has delivered one hundred & sixty thousand (160,000) pounds oats more than stated in your letter of June twenty-seventh (27th). Five (5) car-loads here now. Shall receivals continue?

"CHUBB."

"ST. PAUL, MINN., *July* 17, 1877.

"Lieut. CHUBB, *Bismarck. D. T.:*

"Receive no more oats from Merrian at present.

"LEE,
"*In Charge Office.*"

"BISMARCK, D. T., *Aug.* 10, 1877.

"To CHIEF QUARTERMASTER, *St. Paul:*

"John L. Merrian has four (4) cars oats here, which he offers at his contract rates. Shall I take them?

"CHUBB."

"ST. PAUL, MINN., *August 11th*, 1877.

"Lieut. CHUBB,

"*Quartermaster Bismarck, D. T.:*

"We do not want the additional oats.

"CARD,

"*Chief Quartermaster.*"

19 VII. Neither the receiving officer nor any other officer of the defendants required the claimant to supply for the wants of said station any other quantity of oats than that specifically mentioned in the contract sued on, nor made any requisition upon him therefor; and the claimant did not ask to be informed whether or not any other quantity would be required, and although he repeatedly offered the several car loads referred to in the next preceding finding to the acting assistant quartermaster, and requested him to take them in order to clear up all he had at Bismarck, and get the railroad company's cars unloaded, he never demanded it as a right under his said contract.

VIII. The claimant had the means to deliver oats within the time mentioned in said contract to the full extent of the quantity delivered under said Hall's contract by other parties, in addition to that which was received from him, had he been required, notified, and permitted so to do, and was ready and willing to make such delivery, although he gave the defendants' officers no notice to that effect, and made no other offers than those set forth in the sixth and seventh findings.

IX. The claimant suffered some loss by reason of the non-receipt by the defendants of the several car-loads of oats, mentioned in the sixth finding, and his being obliged to sell the same to other parties; and some loss of profits which he would have made if he had delivered at the contract price oats to the extent of the quantity received by the defendants under said Hall's contracts, in addition to the quantity which he did deliver, and for which he was paid.

CONCLUSION OF LAW.

That no breach by the defendants of the contract set forth in the petition is shown, and they are not liable for any damages upon the foregoing facts, and the claimant's petition must be dismissed.

Opinion of the court.

RICHARDSON, J., delivered the opinion of the court:

The only question of law involved in this case arises upon the construction to be given to the first article of the contract set forth in the petition, the exact language of which is that the claimant agrees to "supply, or

cause to be supplied and delivered, at the quartermaster's department at the military station at *Bismarck, Dak., six hundred thousand pounds, more or less, of oats, at two dollars and twenty-three and seven-sixteenth cents* ($2.23\frac{7}{16}$) *per one hundred pounds, the oats to be of good merchantable quality, free from dirt or other foreign matter, and to be delivered in good, new burlap sacks, each sack to contain no greater quantity than* 128 *pounds,* or such other quantity, more or less, as may be required from time to time for the wants of said station, between the 1st day of July, 1877, and the 31st day of December, 1877, in such quantities and at such times as the receiving officer may require," the words constituting the first J. R. part of the agreement, here printed in italics, being written in a printed blank used by the parties in drawing the contract, and those of the second alternative being in print.

The claimant contends that he was bound to supply, and the defendants were bound to receive from him, not only the 600,000 pounds specifically mentioned, which they did receive and for which he has been paid, but all the oats that the wants of the Bismarck military station required, if more than that quantity, between July 1 and December 31, 1877, however great the same might be, without reference to the quantity specifically named, and without being required so to do by the receiving officer or any other officer of the defendants; and it appearing by the facts proved that the defendants received, during that period, from other parties, under other contracts, 3,116,616 pounds, which he was ready and willing to deliver, he claims that they have violated their obligation, and that he is entitled to recover damages on account thereof to the amount of $21,855.

In our opinion, the obligation which the defendants incurred, assuming it to be coextensive with that of the claimant, according to the uniform decisions of this court and the Supreme Court in the construction of contracts unilateral in form (Speed's case, 8 Wall., 77, and 7 Ct. Cl., 93; Caldwell's case, 8 Ct. Cl., 335; Brawley's case, 11 Ct. Cl., 522, affirmed on appeal 96 U. S., 168, and 13 Ct. Cl., 521), was to receive and pay for either 600,000 pounds, or such other quantity as should be required of him by the defendants' officers for the wants of the military station, and that the doing of either was a performance of their contract and relieved them from further liability. That is the natural and grammatical meaning and the legal effect of the words of the contract, which cannot be interpreted as the claimant would have it without doing violence to the language adopted by the parties and to well-settled rules of law. The word "or" is sometimes made to signify "and," when it appears to be consistent with the meaning implied by the context, and in order to carry out the manifest intent of the contracting parties; but such an interpretation here would be inconsistent with any intent which can reasonably be gathered from the connection in which the word is used, from the whole contract or from the light of the surrounding circumstances, and would compel the defendants to receive not only all the oats required for the station, but 600,000 pounds in addition thereto, without any indication as to what purposes the surplus quantity could be used for or how it was to be disposed of.

This view is in harmony with that adopted by the Supreme Court in the recent case of Dumont et als., pl'ffs in error, vs. The United States (98 U. S. R. —), where a suit was brought upon an importer's bond for the

payment, when the amount should be determined, of duties then unascertained, on certain imported goods, in which the importer and his sureties obliged themselves to pay $525, or the amount of duties which should be ascertained, or should within three years withdraw and export the goods, or transport them to a Pacific port. The ascertained duties proved to be $676.75. The defendants paid the $525 mentioned in the bond, and the court held that the terms of their contract were satisfied, and that no further J. R. amount could be recovered thereon in that action. Although the importer, the principal, would be liable by law for the excess of duties unpaid, independently of the bond, it could not be recovered of him and his sureties under the contract sued on.

The words of the first part of the agreement having been inserted in writing in an otherwise printed contract, it must be inferred therefrom that they constituted the main and substantive part of the agreement, the part which was more carefully considered by the parties than that which followed in print; for, as is said in Parsons on Contracts (vol. 2, ch. 1, § 3, last paragraph), upon the authorities there cited, "It is reasonable to suppose that the intention of the parties was more closely given to those phrases which they themselves selected, and which express the especial particulars of their own contract, than to those more general expressions which belong to all contracts of this class." It is, however, not necessary to determine in this case how far the quantity specifically mentioned in writing might have been varied one way or the other by the defendants' officers under the alternative printed clause which follows; whether by only such a slight deviation therefrom as from the circumstances of the case or the nature of the articles to be delivered might seem to the court to be reasonable according to the rule for the construction of the words "more or less," and the force and effect thereof when used in contracts, as laid down in J. R. Brawley's case (11 Ct. Cl., 528, affirmed on appeal, 98 U. S. R., 166, and 13 Ct. Cl., 521); or by such larger quantity, not disproportionate to that specified, which, from the whole tenor of the contract and the surrounding circumstances, might fairly be presumed to have been within the contemplation of the parties when they entered into the contract; or by any still greater quantity, however large and disproportionate to that specified, which might be required for the wants of the station, as the present claimant contends, a construction which, if adopted in this case, would extend the quantity from 600,000 pounds to 3,116,616 pounds, or more than five times that which was specifically named.

In point of fact, the quantity was not varied nor attempted to be varied in any manner authorized by the contract, but was left to stand as therein specifically written.

It must be observed that the alternative provision, in print, makes the claimant agree to supply not such other quantity, more or less, as might be required from time to time by the wants of the military station, but for the wants of the station in such quantities and at such times as the receiving officer might require. The quantity under that provision was therefore to be determined by the receiving officer before it became fixed, as were the times of delivery also; and as he made no such requirement, the claimant was not bound to deliver, nor the defendants to receive, any quantity whatever, great or small, under that part of the agreement.

After the execution of the contract, in order to avoid unnecessary ex-

pense and preparation in its performance, the claimant had undoubtedly the right to be informed and to know, at reasonable and proper times, if he desired, whether or not any quantity, and, if any, then to what extent, would be required of him under the alternative provision; and as he sought no such information from the defendants' officers, he must be held to have been content with their course of proceeding, and to have understood that no greater quantity would be required of him than that which was specified in the contract. The acquiescence of both parties left that quantity unchanged and as governing the contract between them. The claimant's own actions indicate that such was his understanding of the matter. In thirteen days after the date of his agreement he had
21 delivered the whole 600,000 pounds and a slight quantity in excess, without requisition therefor from the officers or any request from him to learn what quantity would be required. More than a month after that, when he offered to deliver five additional car-loads, and at the end of nearly another month, when he offered four car-loads more, and on other occasions when he asked the officers to receive the same and they refused, he never once claimed the right to deliver them under his contract, but rather asked that they be purchased of him at the contract price as a favor and for his convenience. If he then claimed the construction which he now urges, it was his duty to have so informed the defendants' officers, that they might not be misled; and as he did not do so, they had a right to infer that he assented to their construction that his contract was for only 600,000 pounds, unless the receiving officer himself required a greater quantity, and he is bound thereby.

When the terms of a contract are ambiguous the parties may adopt such a construction as they expressly or by tacit concurrence agree upon, and after one of them has acted upon that construction, incurred expense, or done other acts on the faith thereof, the other party cannot set it aside and insist upon a different interpretation inconsistent therewith. It becomes part of the contract itself, in the nature of a new agreement, and is as binding as though it were one of the original provisions.

Moreover, the construction which the claimant now urges, that the quantity was to be fixed by the wants of the military station, independently of the requirements of the receiving officer, and of the quantity which was specified in the written words, would completely nullify the first provision so carefully written into the contract by the parties, and render it wholly without force or effect from the very beginning; a result which alone shows that it cannot be the correct view, for parties are not supposed to write unmeaning and inoperative provisions in their contracts, and all their words must be allowed to have some significance if possible.

We have thus far considered the case with reference only to the terms of the contract itself, and the subsequent proceedings of the parties thereto. If we call to our aid the light of the circumstances under which the agreement was entered into, as disclosed in the findings of fact, we shall find that it explains some matters which otherwise cannot be well understood, and fortifies and confirms the construction which we have adopted as expressing the manifest object and intention of the contracting parties. On the 1st of March, 1877, the chief quartermaster of the Military Department of Dakota advertised for proposals to be sent in by April

26, 1877, for the delivery of supplies for many different posts, stations, and agencies, among which were oats, estimated to be 4,764,700 pounds, necessary for ten different posts and stations, and which the bidders might offer to deliver at Bismarck, or any of three other places. The claimant made a bid in writing, offering to supply, at Bismarck, 50,000 bushels of oats, equal to 1,600,000, at 71½ cents per bushel, equivalent to $2.23\frac{7}{16}$ per hundred pounds; and 50,000 pounds, at 73 cents per bushel, equivalent to $2.28\frac{1}{8}$ per hundred pounds; and two other lots of 50,000 pounds each, at still higher prices. One Hall made a bid, offering to supply at said Bismarck also 4,000,000 pounds, at $2.25 per hundred pounds. The claimant's bid was therefore the lowest only on his first offer of 1,600,000 pounds, and Hall's bid was the lowest for the remaining estimated quantity. On the 18th of May following, the claimant was notified that a contract had been awarded to him for furnishing 1,000,000 pounds, at the price of $2.23\frac{7}{16}$ per hundred pounds; and a written contract was thereupon entered into between the parties, dated May 15, for the delivery of that quantity. Subsequently, on the 27th of June, apparently with the design of completing the arrangements for the supplies advertised for, the claimant was notified that a further contract for the delivery of 600,000 pounds, at the same price per hundred pounds, was awarded to him; and it will be seen that those two quantities together made exactly the whole for which his bid was the lowest. At the same time said Hall, whose bid was the next lowest, was notified that a contract was awarded to him for furnishing 2,620,000 pounds, which was not the full quantity offered by him, but which, with the two quantities awarded to the claimant, provided very nearly for all that had been estimated for, and was apparently all that it was then supposed would be required, as, in fact, it substantially proved to be. In pursuance of these acceptances, on the 29th of June, 1877, the second contract was made with the claimant, as set forth in the petition, for the delivery of 600,000 pounds; and two other contracts with said Hall, one for the delivery of 1,995,000 pounds absolutely, and the other for 665,000 pounds, with the additional provision, as in the claimant's second contract, "or such other quantity, more or less, as may be required from time to time for the wants of said station, between the 1st day of July, 1877, and the 31st day of December, 1877, in such quantities and at such times as the receiving officer may require." Thus we cannot avoid the inference, so distinctly manifest in this particular case and under these circumstances, that by the insertion of those words in each of the smaller contracts with the two successful bidders, when the whole estimated quantity required was specifically provided for, it was contemplated that they might become operative to apply to some comparatively small additional quantity, which, under some circumstances that might arise, it would be found convenient to deliver and receive; a contingency which did in fact happen in each case; or that if one contractor failed the other might be called on, and not to give each contractor the right to deliver the whole, and thus place the defendants in the position of having at the same time contracted with two separate parties each for precisely the same thing. It does not affirmatively and directly appear that the claimant knew of Hall's bid and contract, but it is not a violent presumption to suppose that he must have known who the success-

22

ful bidders were, and what was the full result of the bidding under the proposals, as only part was awarded to him, and he certainly knew that his bid had been accepted for only 1,600,000 pounds, the exact quantity specifically named in his contracts.

So, under every view which we are able to take of this case, the claimant has no cause of action, and his petition must be dismissed.

V. *Final judgment.*

At a Court of Claims held at the Capitol, in the city of Washington, on the 21st day of April, A. D. 1879, judgment was ordered to be entered as follows:

The court, upon due consideration of the premises, find in favor of the defendants, and do order, adjudge, and decree that the said petition of the claimant, the said John L. Merriam, be dismissed.

23 VI. *Application for an allowance of an appeal.*

From the judgment rendered in the above-entitled cause on the 21st day of April, A. D. 1879, in favor of the defendants and against the claimant, the claimant comes, and by his attorneys, Sanborn and King, hereby makes application for and gives notice of an appeal to the Supreme Court of the United States.

SANBORN AND KING,
Attorneys for Claimant.

Filed May 26, 1879.

And now, to wit, May 26,1879, it is ordered that an appeal be allowed as prayed for.

24 In the Court of Claims.

JOHN L. MERRIAM
vs.
THE UNITED STATES. } No. 11842.

I, John Randolph, assistant clerk of the Court of Claims, do hereby certify that the foregoing are true transcripts of the pleadings in the above-entitled cause, of the findings of fact by the court, and the conclusion of law thereon, of the opinion of the court, of the final judgment of the court, of the application of the claimant for the allowance of an appeal to the Supreme Court of the United States, and of the order allowing same.

In testimony whereof I have hereunto set my hand and affixed the seal of said court, at Washington, this sixteenth day of June, A. D. 1879.

[SEAL.] JOHN RANDOLPH,
Ass't Clerk Court of Claims.

(Indorsement on cover:) No. 210. John L. Merriam, appellant, vs. The United States. Court of Claims. Filed 12 April, 1880.

(Stamp:) Office Supreme Court U. S. Filed April 12, 1880. D. W. Middleton, clerk.

17-437

OFFICE SUPREME COURT U. S.
FILED
MAR 14 1883
JAMES H. McKENNEY, Clerk.

SUPREME COURT

OF THE

UNITED STATES.

JONN L. MERRIAM,

Appellant,

vs.

THE UNITED STATES.

BRIEF OF APPELLANT.

JOHN B. SANBORN,

Attorney for Appellant.

Pioneer Press.

SUPREME COURT OF THE UNITED STATES.

JOHN L. MERRIAM, Appellant.
vs
THE UNITED STATES, Respondent.
No. 210

The Court of Claims found as a fact in this case that the contract executed on the 27th day of June, A. D. 1877, by and between the appellant and respondent contained the following stipulation and provision to wit:

Article I. That the said John L. Merriam, his heirs, assigns, administrators and executors shall supply, or cause to be supplied and delivered to the quartermasters department at the military station of [Bismarck, D. T., six hundred thousand pounds more or less of oats, at two dollars and twenty-three and seven sixteenth cents ($2.23 7-16) per one hundred pounds, the oats to be of good merchantable quality, free from dirt or other foreign matter and to be delivered in good, new burlap sacks, each sack to contain no greater quantity than 128 pounds] or such other

quantity more or less as may be required from time to time for the wants of said station, between the first day of July, A. D., 1877, and the thirty-first day of December, 1877, in such quantities and at such times as the receiving officer may require, * * * *See finding III. Article I,* and that the requirements of the service at that station between July 1st, 1877, and December 31st, 1877, was for 4,876,616 pounds, of which the appellant was notified to deliver and did deliver one million seven hundred and sixty thousand pounds, and the balance, three million one hundred and sixteen thousand six hundred and sixteen pounds, were received from other parties than the appellant, at a higher rate of compensation than his contract rate. See findings four, five and six, record. The appellant was ready and willing to deliver all the oats required by the wants of the service from July 1st, 1877, to January 1st, 1878, but was not permitted so to do by the defendants, and sustained loss and damages on oats offered and not received and loss and damages, in the form of profits on the oats required by the wants of the service and not received from him but received from other parties. (See findings six, eight and nine of the record.) The contract with the claimant was made by advertising for proposals as required by Section 3709 of the Revised Statutes. The twenty-sixth day of April, at noon, was the time limited for receiving proposals. An award was made May 18th, following to appellant, and he entered into all the contracts prepared and presented to him for furnishing the supplies for which he had submitted a proposal which covered all the oats required for the wants of said station

of Bismarck for the use of Forts Abraham Lincoln, Buford, Randall, Rice, Stevenson, Sully, Camp Hancock, Cheyenne, Lower Brule and Standing Rock agencies. (See finding I and II, record.)

ASSIGNMENT OF ERRORS.

I. The said John L. Merriam says that in giving the judgment aforesaid, in the record aforesaid contained, there is manifest error in this, to-wit: That said Court of Claims finding and perceiving that the appellant had entered into a contract with the United States to furnish all the oats required for the wants of said station at Bismarck, between the first day of July, A. D. 1877, and the thirty-first day of December, A. D. 1877; and that there had been required for the wants of said station during said time, 4,876,616 lbs., and that the appellant was prepared and willing to furnish the same, but was not permitted by the defendants to furnish more than 1,760,000 lbs. of the same, and that the remainder were purchased at a higher rate from other parties, whereby the appellant sustained loss and damages; did, nevertheless, decide and adjudge that the appellant had no cause of action, and that his petition be dismissed.

II. And there is also error in this, that said Court below did give the judgment aforesaid against the appellant in favor of the United States, whereas by the law of the land the same should have been given in favor of said appellant and against the United States.

III. And there is also error in this, that said Court of

Claims finding and perceiving that it was provided in and by said contract entered into by and between the appellant and the United States that the appellant should furnish and deliver to the United States at the military station of Bismarck, D. T. six hundred thousand pounds more or less of oats at two dollars and twenty three and seven sixteenth cents ($2.23 7-16) per one hundred pounds, the oats to be of good merchantable quality,free from dirt or other foreign matter and to be delivered in good, new burlap sacks, each sack to contain no greater quantity than one hundred and twenty eight pounds, *or such other quality more or less as may be required from time to time for the wants of said station between the first day of July A. D.* 1877, *and December* 31*st* 1877, *in such quantities and such times as the receiviny officer may require*, did decide and adjudge that the quantity of oats that the claimant was required to furnish by the terms of said contract and the quantity that the respondents were bound to receive thereby was limited to the quantity that the receiving officer at said station of Bismarck required the claimant to deliver and not to the quantity required for the wants of the station for the purposes indicated in the proposals and contract and for this gave the judgement of said Court against the appellant and in favor of the United States.

IV. And there was error in this, that said Court of Claims applied rules of construction to said contract that apply and pertain only to contracts containing ambiguous or inconsistent or incompatible provisions or to contracts that have been construed and acted upon by the parties thereto in a manner inconsistent with the express terms and con-

ditions thereof whereas in the findings of fact by said Court and in the record and case no ambiguous or inconsistent or incompatible provisions are found in said contract and no acts or words of the claimant indicating any construction of the same, other or different than that given by the law upon all like or similar contracts and gave judgement against the appellant and in favor of the respondent on said grounds.

V. And there is error in this, that said Court of Claims finding and perceiving that there were discrepencies and inconsistencies between the advertisment for proposals, proposals, and awards made thereon, and the contracts entered into and by and with the claimant in pursuance thereof did decide and adjudge that wherein these inconsistencies and discrepencies existed the proposals and awards must govern and not the contract between the parties.

Wherefore and for other errors in the proceedings apparent the appellant prays that said judgment may be reversed and the cause remanded with directions to said Court of Claims to enter judgment in favor of the appellant for his loss and damages resulting from the breach of said contract as aforesaid and against the United States.

1. Written contracts are to be construed according to the true sense of the written words as the parties used them, and when the true sense is ascertained, to subject the contract in its operations to the established rules of law, is the whole duty of the court.

Greenleaf on Evidence, Vol. 1, *par.* 276-277.
Brawley vs. The United States, 96 *U. S. p* 168.

Claims finding and perceiving that it was provided in and by said contract entered into by and between the appellant and the United States that the appellant should furnish and deliver to the United States at the military station of Bismarck, D. T. six hundred thousand pounds more or less of oats at two dollars and twenty three and seven sixteenth cents ($2.23 7-16) per one hundred pounds, the oats to be of good merchantable quality,free from dirt or other foreign matter and to be delivered in good, new burlap sacks, each sack to contain no greater quantity than one hundred and twenty eight pounds, *or such other quality more or less as may be required from time to time for the wants of said station between the first day of July A. D.* 1877, *and December* 31*st* 1877, *in such quantities and such times as the receiviny officer may require*, did decide and adjudge that the quantity of oats that the claimant was required to furnish by the terms of said contract and the quantity that the respondents were bound to receive thereby was limited to the quantity that the receiving officer at said station of Bismarck required the claimant to deliver and not to the quantity required for the wants of the station for the purposes indicated in the proposals and contract and for this gave the judgement of said Court against the appellant and in favor of the United States.

IV. And there was error in this, that said Court of Claims applied rules of construction to said contract that apply and pertain only to contracts containing ambiguous or inconsistent or incompatible provisions or to contracts that have been construed and acted upon by the parties thereto in a manner inconsistent with the express terms and con-

ditions thereof whereas in the findings of fact by said Court and in the record and case no ambiguous or inconsistent or incompatible provisions are found in said contract and no acts or words of the claimant indicating any construction of the same, other or different than that given by the law upon all like or similar contracts and gave judgement against the appellant and in favor of the respondent on said grounds.

V. And there is error in this, that said Court of Claims finding and perceiving that there were discrepencies and inconsistencies between the advertisment for proposals, proposals, and awards made thereon, and the contracts entered into and by and with the claimant in pursuance thereof did decide and adjudge that wherein these inconsistencies and discrepencies existed the proposals and awards must govern and not the contract between the parties.

Wherefore and for other errors in the proceedings apparent the appellant prays that said judgment may be reversed and the cause remanded with directions to said Court of Claims to enter judgment in favor of the appellant for his loss and damages resulting from the breach of said contract as aforesaid and against the United States.

1. Written contracts are to be construed according to the true sense of the written words as the parties used them, and when the true sense is ascertained, to subject the contract in its operations to the established rules of law, is the whole duty of the court.

Greenleaf on Evidence, Vol. 1, *par.* 276-277.
Brawley vs. The United States, 96 *U. S. p* 168.

And the law does not look to the secret intention of any of the parties as contra-distinguished from the words used by them in the contract, but looks wholly to and is governed by the words used.

Doe vs. Guillian, 5 *B. & Ad.* 122-129.

Doe vs. Martin, 5 *B. & Ad.* 771-786.

2. When the words used in a written contract are not ambiguous, repugnant or incompatible, neither the negotiations between the parties that preceded its execution, nor the acts of one party to the same done without the knowledge or consent of the other, pertaining to the execution of the contract or the subject matter thereof, which may afford some indication of the construction given the contract by that party, nor any parol evidence is admissible to change or modify the terms and conditions thereof, and in construing such a contract the law is governed wholly by the words uesd by the parties. Here is found the best evidence of the intent and meaning of those bound by the contract, and who are to to receive benefits or sustain damages therefrom; and here is found the consummation of all negotiations, and the courts and law look no further to determine what the contract is and how it shall be construed. No other words are to be added to it or substituted for those used by the parties.

Greenleaf on Evidence, Vol. 1, *par.* 276-277.

Brawley vs. The United States, 96 *U. S. p.* 168.

3. In the following words in the written contract in controversy, to-wit: "Shall supply or cause to be supplied and delivered to the Quartermaster's Department at the

military station of Bismarck, D. T., six hundred thousand pounds, more or less, of oats, * * * * or such other quantity, more or less, as may be required from time to time for the wants of said station between the first day of July, 1877, and the thirty-first day of December, 1877, in such quantities and at such times as the receiving officer may require," there is nothing ambiguous, repugnant, incompatible, or inconsistent. The wants of the station and the time between July 1st and December 31st fix the quantity to be delivered and the time within which it was to be delivered, while the requisitions of the receiving officer would fix the proportion of the whole quantity that the appellant must furnish at a time named in the requisition.

Brawley vs. The United States, 96 *U. S.* 168.

4. If the wants of said station required oats and the receiving officer failed to fix quantity and time of delivery of oats wanted, and to inform the appellant, but notified strangers to the contract, and received from them, this would be a breach of the contract for which the appellant is entitled to recover any damages he sustained.

5. The obligation of the United States to receive is coextensive with the obligation of the appellant to furnish under a unilateral contract of this character, and the obligation of the appellant being limited only by the wants of the station, the obligation of the United States was to receive from the appellant all oats wanted by the service at that station.

Speed's case, 8*th Wallace*, *p.* 77

Brawley's case, 96 *U. S.* 168.

ARGUMENT.

I.

The contract was entered into after advertisement for proposals, proposals and an award, and is legal and valid in all respects, and those portions of the same upon which this case turns are precisely the same in principle as the like portions of the contract construed by this court in the case of Brawley vs. The United States, 96 U. S. 168, and the same rule of construction should apply.

In that case the Post Fort Pembina did not "need"—require for the wants of the station more than the forty cords of wood. (See page 170, 96 U. S. Supreme Court Reports.) In this case the wants of the Station during the period of time covered by the contract was for four million eight hundred and seventy-six thousand and six hundred and sixteen pounds of oats, of which the claimant was permitted to furnish one million seven hundred and sixty thousand pounds. The "needs," the "wants" of the post or station was held to govern in the Brawley case and the same conditions must govern here. The principle ruled was that in contracts where the ordinary words "more or less" are supplemented by other stipulations and conditions that give them a broader scope or more extensive significance, then the contract is to be governed by such added stipulations and conditions. So that in that case, although eight hundred and eighty cords was mentioned as the quantity limited by the contract, the court held that the United States were not in law required to take more than forty cords, if that was all needed for the

post and required by the commander,—one twenty second part of the amount,—and of course if the needs of the post had demanded twenty-two times as much—nineteen thousand three hundred and sixty cords—the party to the contract would be legally bound to furnish that amount. In such contracts the legal limitation of quantity is the "need," "wants," "requirements" of the service, and not the quantity given or named in the other portion of the contract. The contract fixes price to be paid, place, time and manner of delivery, etc., and wisely, prudently leaves the quantity to be determined by the necessities of the service, which becomes obligatory and conclusive upon both parties.

II.

The Court of Claims, disengenuously it seems to us, perverts the very acts which constitute the breach of the contract into acts of construction of what they erroneously term an ambiguous contract. On the 17th of July, after the defendants had received from him eleven hundred and sixty thousand pounds of oats—the contract designating one million, or such other quantity, etc.—the claimant, seeing that the "wants of said station required more," continued his shipments till the receiving officer absolutely refused to receive any more oats from him at present. On the eleventh of August, seeing that oats were still wanted at that station, the claimant tendered four car loads more, which were refused. (See sixth finding of fact.) This shows the appellent's construction. The wants of the station required more oats, as the claimant knew. The receiving officer not only failed and refused to require of

claimant specific quantities at specific times to meet there wants, as provided by the contract, but failed and refused to receive them at all from claimant, and received them at a higher price from others. This is a breach of the contract, and not a construction of it—a breach in the face of the construction, claims and demands of the appellant made at the time, and of the plain and *unambiguous* terms of the contract as construed by the Court of Claims in Brawley's case before this contract was made, afterwards affirmed by this Court.

A. The construction of the Court below that the obligation of the claimant to furnish and of the defendants to receive was limited by the requirements of the defendants officers for the wants of that station, and not by the actual wants of the station does violence alike to the contract and to the act of congress providing how supplies shall be procured and how contracts shall be made for furnishing them.

All purchases and contracts for supplies or services in any of the Departments of the Government, except for personal services, shall be made by advertising a sufficient time previously for proposals respecting the same, when the public exegencies do not require the immediate delivery of the articles or performance of the service. * * * * Sec. 3709 Revised Statutes.

The following section 3710 provides that parties bidding shall be notified of the time and place of opening the bids and be permitted to be present in person or by attorney. The spirit of these laws more plainly and pointedly than the letter removes the whole matter of furnishing the supplies from the preferences, partialities, friendship and favors of the officers and agents of the government engaged in

this service. Fair and open competions is to take the place of those human infirmities common to all, and the best interests of the governmen is to determine what had before been decided too often upon personal, political or selfish grounds. The doctrine of the Court of Claims in this case invades and sweeps away at a breath this spirit and purpose of the law. It says to the claimant that the United States invited proposals and you made them, and the award was made to you on May 18th, 1877, as soon as it was determined that your bid was the lowest and best, and you have executed all the contracts that we have prepared for you and they cover all the oats required for the wants of the station at Bismarck, but if the Receiving Officer at Bismarck is not your friend and does not prefer to receive the oats from you but concludes to receive them from some friend of his at a higher rate even, he can do so, and neither the law nor your contract will protect you. If oats rise rapidly and are furnished under the contract at great loss, he will of course require you to furnish them all, but if they decline and are furnished at a profit at the contract rate, this officer will not require them of you, but of some friend whom he will desire to make the profit. We submit that this is perversion of both law and contract, and not legal construction. And yet it is exactly the case at bar. We refer to matters of public notoriety and general knowledge. In 1876 the locusts or grasshoppers had traversed over and devoured the grain crop to a great extent along the whole frontier. In the spring of 1877, and until as late as the twentieth of July, these locusts hung like a dark cloud along the whole western horizon, threatening to destroy every

green thing. Between the fifteenth and the thirtieth of July they all disappeared. The market price and value of oats at Bismarck and throughout the frontier was greatly depreciated by these conditions.

Up to the time of this depreciation the claimant received prompt notice of the times when certain quantities of those oats wanted for the supply of the station should be delivered, After the depreciation the notices and requirements for specific amounts for those wanted at the station, and the time when such amounts should be delivered was furnished to other parties, who promptly furnished the oats at a large profit, a rate higher than the Appellant's contract rate.

Hence we see that the amount to be furnished is not governed by the wants of the service, nor by the contract nor the award, and the price is not fixed by advertisement for proposals, proposals, awards and contracts, but by the caprice, whims, preferments and friendships of the receiving officer, which is illegal, and if one construction will render a contract illegal and another will make it valid, the latter will be preferred.

Merrell vs. Melchair, 30 *Miss.*, 516.
Chittenden vs. French, 21 *Ill.*, 598.
Archibald vs. Thomas, 13 *Cowan*, 289.
Thrall vs. Newell, 19 *Vt.*, 202.
Riley vs. Vanhanton, 4 *Howard, Miss.* 428.
Olcott vs. Tioga R. R. Co. 27, *N. Y.* 546.
Patrick vs. Grant, 14 *Me.* 233.

The award of May 18 determined who was the lowest and best bidder for supplying oats, and that of June 27 confirmed the previous action, (see page 940 of record,) and the contracts made in pursuance of these awards, including the one in controversy, exhausted the powers of the department in regard to supplying said oats, until the appellant refused to contract under the award as required or having contracted, committed a breach of the contract.

B. There is not a pretence in the record that the claimant had a suspicion even that an award of a contract would be made to another party at a higher rate, when oats had commenced to decline, "and to suppose," in the language of the Court of Claims, "that he must have known who the successful bidders were, and what was the result of the bidding under the proposals," when the award had been made to him, and the contracts made with him for the full amount wanted in the service at that station, is certainly a presumption most violent, involving alike the integrity of officers and common sense of the appellant. But contracts are not modified by presumptions, and we refer to the matter simply to show to what straits the court below was driven to sustain its conclusion.

III.

"All this is irrelevant matter. The written contract merged all previous negotiations, and is presumed in law, to express the final understanding of the parties. If the contract did not express the true agreement it would not have been signed by the chief quartermaster of the depart-

ment, nor approved by so faithful and exalted officers as Gen'ls Terry and Sheridan.

Ninety-six United States, page 178, *last paragraph.*

Hawes vs. Smith, 12 *Me.* 429.

Mansfield, etc., R. R. Co., vs. Veeder, 17 *Ohio*, 385.

McWilliams vs Martin, 12 *Serg. & Rawle*, 260.

Lober vs. LeRoy, 2 *Sandf. N. Y.* 202.

Goorey vs. Ganey, 48 *Miss.* 210.

And a party who takes an agreement prepared by another, as all parties do who contract with the United States, and upon its faith incurs obligations and parts with property, should have a construction given to the instrument favorable to himself.

Noonan vs. Bradley, 9 *Wall.* 394-407.

To find the true sense of the written words as the parties used them, and when the true sense is ascertained, to subject the contract in its operations to the established rules of law, is the whole duty of the Court. Here is the language of the parties; here the best possible evidence of the intent and meaning of those bound by the contract, and who are to receive the benefits of it; here the consummation of all negotiations, and the courts and law look no further to determine what the contract is, and how it shall be construed. No other words are to be added to it or substituted for those used by the parties.

Greenleaf on Evidence, Vol. I., Redfield's Edition, pp. 276, 277.

IV.

There is nothing ambiguous, repugnant or incompatible in the words expressing quantity, viz: "shall supply, or cause to be supplied or delivered * * * six hundred thousand pounds, more or less, of oats, * * * or such other quantity, more or less, as may be required from time to time for the wants of said station, * * * in such quantities and such times as the receiving officer may require." This language imposed two obligations upon the Appellant, viz:

1. To supply all the oats required for the wants of the station, for the time specified.

2. To supply them in such quantities and times as the receiving officer should require.

Can anything be plainer than that the Appellant is hereby placed under obligation to deliver all the oats required for the wants of the station, and to deliver them in such times and quantities as the receiving officer shall require, and that the United States is hereby placed under obligation to receive form the appellant all the oats wanted for the service at that station, and through the receiving officer to give reasonable notice of the amounts to be delivered at a given time, and times of delivery of such amounts. And yet in the court below the failure of the respondent's officer to give this reasonable notice is treated as an act of construction, and not as a breach of the contract.

A promises to build a house for B, and provide all the material for the same, during the year 1883, for ten thousand dollars, and to lay the foundation and complete the

superstructure at such times within said year as B shall designate. A provides the material and is ready to fulfil the contract on his part, but B designates no time to lay the foundation, and no time to complete the superstructure, and employs C to build said house during this time, to B's damage in the sum of two thousand dollars. Is here a breach, a cause of action to A? If so there is a cause of action to the Appellant in this case against the United States.

JOHN B. SANBORN,
Attorney for Appellant.

17-437

OFFICE SUPREME COURT U.S.
FILED
MAR 21 1883
JAMES H. McKENNEY, Clerk.

In the Supreme Court of the United States.

OCTOBER TERM, 1882.

MERRIAM
vs.
THE UNITED STATES. } No. 210.

BRIEF FOR THE UNITED STATES.

This is a case in which the United States, requiring a large quantity of oats (by estimate, 4,464,700 pounds, folio 16), at certain military posts in Dakota, advertised for proposals to supply the same. Thereupon Merriam *proposed* (folio 17) to furnish 6,400,000 pounds in four equal lots at four different rates per bushel. This proposal was accepted for the lot lowest in price, *i. e.*, 1,600,000 pounds at $\$2.23\frac{7}{16}$ per 100 pounds. For the rest of the estimated requirement a bid by another person was accepted as being lower than the other bids by Merriam.

Merriam's accepted proposal was covered by two contracts (for 1,000,000 and for 600,000 pounds, respectively), the latter of which, being that now sued upon, bound him to supply "600,000 pounds, more or less, of oats [&c.], *or such other quantity, more or less, as may be required from time to time for the wants of such station,* be-